

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MUSLIM COMMUNITY ASSOCIATION)
OF ANN ARBOR, et al.,)
)
Plaintiffs,) Civil Action No. 03-72913
)
v.) Honorable Denise Page Hood
)
JOHN ASHCROFT, in his official capacity as) Magistrate Judge R. Steven Whalen
Attorney General of the United States, et al.,)
)
Defendants.)

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE TO DEFENDANTS' LETTER OF MAY 19**

In the Complaint filed by plaintiffs in this action on July 30, 2003, four of the six organizational plaintiffs alleged that they "reasonably believe[] that the FBI has used or is currently using Section 215 to obtain records or personal belongings about [each plaintiff organization] and its members." Complaint, ¶¶ 45, 83, 90, and 137. A fifth plaintiff went one step further, alleging that it "reasonably believes that the FBI is currently using Section 215 to obtain records and personal belongings of CAIR and its members." *Id.*, ¶ 123. Similar allegations were made with respect to the records of five individual members of the plaintiffs. *Id.*, ¶¶ 58, 66, 72, 94, and 133.

As defendants subsequently established, these "beliefs" were the product exclusively of plaintiffs' fertile imaginations, as section 215 had not been used *at all* at any time before plaintiffs' complaint was filed, much less for the purpose of obtaining *plaintiffs'* records. Declaration of James Baker dated October 2, 2003, ¶ 3. Thus, plaintiffs' claims rested not on any actual or even threatened use of Section 215, but instead on the mere possibility that Section 215 might be used at some future

time and, if it were, that the records and personal belongings of these plaintiffs conceivably might be affected. As defendants explained in their prior memoranda, plaintiffs' allegations of possible future injury, and their speculation regarding the potential scope of some hypothetical Section 215 Order that may or may not ever be issued, fail to satisfy basic constitutionally mandated standing and ripeness requirements. *See generally* Memorandum in Support of Defendants' Motion to Dismiss, at 10-19; Reply Brief, at 3-10.

Plaintiffs, in their most recent submission, urge that "the principal basis for defendants' standing and ripeness arguments has disappeared entirely." Plaintiffs' Response to Defendants' Letter of May 19 ("Pl. Resp."), at 3. They base this assertion on newly "obtained evidence that the FBI invoked Section 215 as early as October 17, 2003 . . ." *Id.* at 2. Plaintiffs are simply mistaken, however, both in their factual characterization of the "evidence" and in their legal argument as to its relevance.

Indeed, plaintiffs chide the Government for supposedly failing to inform the Court "for eight months" that the FBI had "submitted a Section 215 application to the FISA Court on or about October 17, 2003." Pl. Resp. at 2-3. Yet the redacted memorandum upon which plaintiffs rely, on its face, does not establish that the Government submitted an application to the FISA Court at that time, as suggested by plaintiffs. The actual facts and circumstances surrounding this memorandum are described in the classified portions of the Supplemental Declaration of James A. Baker that has been submitted by defendants in conjunction with this memorandum.¹

¹ Because Mr. Baker's supplemental declaration contains classified information relating to intelligence activities, the unredacted original declaration is being submitted *ex parte* for review by the Court *in camera*. The unclassified portions of the declaration are annexed to this memorandum. The classified declaration is in the custody of an officer of this Court who has the

In any event, plaintiffs' post-complaint filings, including their most recent submission, are conspicuously devoid of any evidence, or even an allegation, that a Section 215 order has been served upon any one of the six plaintiff organizations that brought this action, or upon any of the

necessary security clearance and security container. It is available for review by the Court upon request in accordance with the requirements of E.O. 12958, as amended by E.O. 13292, and the applicable regulations. 28 C.F.R. §§ 17.17 and 17.46.

The regulations prohibit dissemination of classified information outside the Executive Branch "except under conditions that ensure that the information will be given protection equivalent to that afforded within the Executive Branch." 28 C.F.R. § 17.46(a). District Court Judges "do not require a determination of their eligibility for access to classified information by the Department." *Id.*, § 17.46(c). However, Federal Magistrate Judges and "[a]ll other . . . Judicial personnel including, but not limited to . . . court reporters, typists, secretaries, law clerks, and translators who require access to classified information must be determined eligible by the Department's Security Officer consistent with standards established in th[e] regulation." *Id.*

In cases where classified materials are submitted for judicial review, Department of Justice regulations require government counsel to take all appropriate action to protect the information against unauthorized disclosure. See 28 C.F.R. §§ 17.17(a) and (c). In civil proceedings (which are not governed by the Classified Information Procedures Act), the regulations require that the Department seek the following security safeguards to protect classified information. Specifically, classified information is not to be disclosed or introduced into evidence without the prior approval of either the originating agency, the Attorney General, or the President. See 28 C.F.R. § 17.17(c)(2). Attendance at any proceeding where classified information will be disclosed is to be limited to those persons with appropriate authorization to access this information, whose duties require knowledge or possession of the classified information to be disclosed. See 28 C.F.R. § 17.17(c)(3). Classified documents are to be appropriately handled and stored in a manner consistent with Department of Justice security directives. See 28 C.F.R. §§ 17.17(c)(4) & (7). Any documents prepared by the Court that contain classified information, and the classified portions of any transcript, are to be prepared, handled, and stored consistent with the directives of the Department of Justice Security Officer, see 28 C.F.R. § 17.17(c)(7), and retrieved at the close of the proceedings by the Justice Security Officer for safeguarding or destruction. See 28 C.F.R. § 17.17(c)(9). At the conclusion of the proceedings, all classified information is either to be returned to the Department of Justice or the originating agency, or placed under court seal. See 28 C.F.R. § 17.17(c)(8). Defendants respectfully request that the Court contact Mary Cradlin, Security Specialist, Security and Emergency Planning Staff, Department of Justice (Tel. 202-514-9016) for further explanation of the security arrangements if the Court deems this necessary.

individuals identified by plaintiffs as members of those organizations. Thus, as was the case when plaintiffs' Complaint was first filed, plaintiffs' claims today rest solely on speculation that plaintiffs might be injured if a Section 215 order is served upon them at some unspecified future time – allegations which, as a matter of law, fail to create a present case or controversy that is justiciable in federal court.

As defendants' counsel emphasized in his letter to the Court of May 19, if and when a Section 215 order is served on these plaintiffs, they will have ample opportunity to challenge it before the court that issues the order (*i.e.*, the FISA Court). They cannot, however, bring an anticipatory challenge to a hypothetical order which may or may not ever be issued and which may or may not be directed to these particular plaintiffs.

CONCLUSION

In sum, plaintiffs' "newly discovered" evidence adds nothing relevant or material to the claims asserted in plaintiffs' Complaint all of which, for reasons previously stated, should be dismissed for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim.

Dated: July 1, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on July 1, 2004, I caused a copy of the foregoing Defendants' Reply to Plaintiffs' Response to Defendants' Letter of May 19, together with a redacted copy of the Supplemental Declaration of James A. Baker (which excludes paragraphs 4-9 of the Declaration), to be served by overnight courier on plaintiffs' counsel at the offices specified below:

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SUPPLEMENTAL DECLARATION OF JAMES A. BAKER

I, James A. Baker, declare and state as follows:

1. I am Counsel for Intelligence Policy at the United States Department of Justice and head of the Office of Intelligence Policy and Review ("OIPR"). On October 2, 2003, I signed a declaration which was subsequently filed by defendants' counsel in support of defendants' motion to dismiss this action. As that declaration reflects, the OIPR is responsible for, among other things, preparing and presenting applications to the Foreign Intelligence

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Classified by: James A. Baker, Counsel for
Intelligence Policy, OIPR, DOJ
Reason: 1.4(c)
Declassify on: X1

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Surveillance Court ("FISC"), pursuant to Section 215 of the USA Patriot Act, Pub. L. 107-56, 115 Stat. 272, 286-288 (Oct. 26, 2001) (codified at 50 U.S.C. § 1861). (U)

2. As I previously stated, the Department of Justice, including the Federal Bureau of Investigation (FBI), presented no applications to the FISC for issuance of an order authorized by Section 215 during the period between its effective date on October 26, 2001 and September 18, 2003. This supplemental declaration pertains to the period between September 19, 2003, and June 30, 2004, a period which was not addressed in my prior declaration. As explained below, a portion of this supplemental declaration contains classified national security information and may not be disclosed except as authorized by the governing Executive Order. The statements made in this supplemental declaration are based on my personal knowledge, upon my review of official records, and upon information provided to me by others in their official capacity. (U)

3. On or about October 15, 2003, the National Security Law Branch of the FBI's Office of General Counsel transmitted a memorandum to OIPR which enclosed a proposed "Application for an 1861 Order for filing with the [Foreign Intelligence Surveillance] Court." A redacted copy of this memorandum is attached as Exhibit B to the Supplemental Declaration of Jameel Jaffer in Support of Plaintiffs' Response to Defendants' Motion to Dismiss. (U)

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10. As this Court is aware, on September 18, 2003, the Attorney General declassified the number of times that the Department of Justice, including the FBI, had utilized Section 215 from October 26, 2001 (the effective date of the USA Patriot Act) until September 18, 2003. In making that determination, the Attorney General stated his

... concern that the public not be misled regarding the manner in which the U.S. Department of Justice, and the FBI in particular, have been utilizing the authorities provided in the USA PATRIOT Act. Public confidence in law enforcement is of paramount importance. That is why I have taken this action despite the fact that it is generally not in the interest of the United States to disclose information of this nature. . . . [T]o date, we have not been able to counter the troubling amount of public distortion and misinformation in connection with Section 215. Consequently, I have determined that it is in the public interest and the best interest of law enforcement to declassify this information.

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Notwithstanding the Attorney General's decision to declassify the number of times that the Department of Justice used Section 215 between October 26, 2001, and September 18, 2003 – based upon his determination that other factors outweighed the harm to the national security that would result from disclosure of that number – information regarding the Department's use of Section 215 after that date remains properly classified. (U)

11. The classification and protection of national security information is governed by Executive Order 12958, as amended by Executive Order 13292 (the Executive Order). 68 Fed. Reg. 15315 (Mar. 28, 2003). Section 1.1 of the Executive Order provides that an original classification authority may classify information produced by or for, or under the control of, the United States Government that falls within one or more of the categories of information listed in Section 1.4 of the Executive Order provided that an original classification authority determines that the unauthorized disclosure reasonably could be expected to result in damage to the national security, and is able to identify and describe the damage. (U)

12. As the Counsel for Intelligence Policy of the Department of Justice, I hold original classification authority by delegation from the Attorney General, and am authorized to make determinations regarding classification of national security information. The information set out in paragraphs 4 through 9 of this supplemental declaration, which pertains to the government's use or non-use of Section 215 orders in conjunction with intelligence and counter-terrorism investigations, falls within the scope of Section 1.4(c) of the Executive Order, as amended, which provides that information that concerns "intelligence activities (including special activities), intelligence sources or methods, or cryptology" may be considered for classification. For the

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reasons set out below, I have determined that the unauthorized disclosure of this information reasonably could be expected to result in damage to the national security of the United States.

(U)

13. Each technique for collection of information authorized by Congress under the FISA, including the authority to seek an order from the FISC compelling production of records and other tangible things, is a tool employed by the Government flexibly and typically covertly, as part of a larger deployment of all of the tools of the FISA, against the changing ways and tradecraft of the national security threats against the United States, including threats posed by international terrorism. Hostile intelligence services and international terrorist groups operating in the United States are sensitive to information that points to certain categories of targets or certain types of methods as either the focus or the relative safe harbors from scrutiny by the FBI through the FBI's use of FISA. Disclosure of the number of application(s) that have been made to the Foreign Intelligence Surveillance Court for a Section 215 order during the past nine months would enable our adversaries to discern whether or to what extent business records and other "tangible things" in the hands of third parties were or were not a safe harbor from the FBI and, armed with that information, to conduct their intelligence or international terrorist activities against us more securely. (U)

14. Disclosure of the exact timing and use of particular intelligence collection methods, such as the use of a Section 215 order, would exacerbate that harm by enabling an adversary to discern what information may have been subject to exposure and might have been compromised during a particular time period, and to take countermeasures to prevent any further detection or

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compromise of ongoing intelligence and/or terrorist operations. For these reasons, I have determined that the unauthorized disclosure of the information contained in paragraphs 4 through 9 of this supplemental declaration reasonably could be expected to cause serious damage to our national security, and is therefore properly classified as Secret in accordance with Section 1.2(a)(2) of the Executive Order, as amended. (U)

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 1, 2004



JAMES A. BAKER

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